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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

PENGUIN GROUP (USA) INC.,

PLAINTIFF,

v.

AMERICAN BUDDHA,

DEFENDANT.

Case No. 3:13-cv-00497-HU

FIRST AMENDED COMPLAINT

Plaintiff Penguin Group (USA) Inc. ("Penguin"), alleges:

NATURE OF THE ACTION

1. In this action Penguin seeks preliminary and permanent injunctive relief and damages arising out of American Buddha's willful infringement of Penguin's exclusive rights in the novels *Oil!* by Upton Sinclair and *It Can't Happen Here* by Sinclair Lewis; and two new translations: E. J. Kenney's translation of *The Golden Ass* by Apuleius and R.E. Latham's translation of *On the Nature of the Universe* by Lucretius.

THE PARTIES

2. Plaintiff Penguin Group (USA) Inc. is a Delaware corporation having its principal place of business in the City and County of New York.

3. Defendant American Buddha is an Oregon not-for profit corporation, with a principal place of business at 2165 South Avenida Planeta, Tucson, Arizona 85710.

JURISDICTION AND VENUE

4. Subject matter jurisdiction exists in this case pursuant to 28 U.S.C. § 1331, giving this Court original jurisdiction in a civil action raising a federal question, and 28 U.S.C. § 1338(a), giving this Court original and exclusive jurisdiction in a civil action arising under the copyright laws of the United States.

5. Defendant American Buddha is subject to personal jurisdiction in this district because it is a corporation created under the laws of the State of Oregon.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(a).

FACTS

7. Penguin is the owner of exclusive publishing rights in the new translation by E. J. Kenney of *The Golden Ass* by Apuleius (“*The Golden Ass*”).

8. The copyright in *The Golden Ass* is valid and subsisting, and is the subject of Registration Nos. TX 6-891-445 and TX 6-891-049 at the United States Copyright Office.

9. In December 2008 Penguin learned that a complete copy of the text of *The Golden Ass* in digital format was posted on the website located at www.naderlibrarv.com (the “Website”).

10. Penguin notified American Buddha’s counsel and DMCA agent of the infringement. American Buddha’s counsel counter-noticed the agent, stating that publishing *The Golden Ass* on the Website was not infringing for various reasons, including fair use and the library exception. Penguin responded, informing counsel that neither the fair use nor the library

exceptions protected full reproduction and distribution of Penguin's copyrighted materials online.

11. In January 2009 Penguin learned that a complete copy of the text of the novel *Oil!*, by Upton Sinclair ("*Oil!*"), in digital format was posted on the Website.

12. The copyright in *Oil!* is valid and subsisting, and is the subject of Registration No. R132078 at the United States Copyright Office.

13. Penguin is the owner of exclusive publishing rights in *Oil!*.

14. In January 2009 Penguin learned that a complete copy of the text of the novel *It Can't Happen Here*, by Sinclair Lewis ("*It Can't Happen Here*"), in digital format, was posted on the Website.

15. The copyright in *It Can't Happen Here* is valid and subsisting, and is the subject of Registration No. R303502 at the United States Copyright Office.

16. Penguin is the owner of exclusive publishing rights in *It Can't Happen Here*.

17. In 2009, Penguin learned that a complete copy of the text of R.E. Latham's translation of *On the Nature of the Universe* by Lucretius ("*On the Nature of the Universe*"), in digital format, was posted on the Website.

18. The copyright in *On the Nature of the Universe* is valid and subsisting, and is the subject of Registration No. TX 6-891-433 at the United States Copyright Office.

19. Penguin is the owner of exclusive publishing rights in *On the Nature of the Universe*.

20. In 2009, Penguin sued American Buddha for infringement of The Works in the United States District Court for the Southern District of New York. The District Court held that it lacked personal jurisdiction over American Buddha under New York's long-arm statute because no injury had occurred in New York. *Penguin Group (USA) v. Am. Buddha*, No. 09 Civ. 528, 2009 WL 1069158, 2009 U.S. Dist. LEXIS 34032 (S.D.N.Y. April 21, 2009) ("[W]hile the electronic nature of the alleged infringement may make it possible for others acting in New York

to infringe plaintiff's copyrights here, plaintiff has not alleged such a New York infringement, and bases its claim of injury solely on the economic effect of an injury inflicted by defendant elsewhere.”).

21. On appeal to the United States Court of Appeals for the Second Circuit, the Second Circuit certified a question to the New York Court of Appeals regarding whether an injury occurred in New York when a New York copyright holder's work was uploaded onto the internet. *Penguin Group (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 42 (2010) (“In copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under [New York's long-arm statute] the location of the infringing action or the residence or location of the principal place of business of the copyright holder?”).

22. After the New York Court of Appeals held that a New York owner of a copyright sustains an in-state injury when its copyrighted work is uploaded to the internet, *Penguin Group (USA) Inc. v. Am. Buddha*, 946 N.E.2d 159, 163 16 NY3d 295 (N.Y. 2011) (“[A] New York copyright owner alleging infringement sustains an in-state injury pursuant to [New York's long-arm statute] when its printed literary work is uploaded without permission onto the Internet for public access.”), the Second Circuit reversed the District Court's original opinion and remanded for consideration of the other factors necessary to confer personal jurisdiction over an out-of-state defendant under New York's long-arm statute. *Penguin Group (USA) Inc. v. Am. Buddha*, 640 F.3d 497, 501 (2011) (“We therefore vacate the judgment of the district court and remand this case to that court for its consideration in the first instance of whether Penguin has established the four remaining jurisdictional requisites, and the extent to which the assertion of personal jurisdiction over American Buddha would be consistent with the requirements of Due Process.”).

23. On remand, the District Court concluded that despite injury occurring in New York, there was no personal jurisdiction over American Buddha under the limitations of New York's long-arm statute, and it ordered dismissal of the complaint on March 7, 2013. *Penguin Group (USA) Inc. v. American Buddha*, 2013 U.S. Dist. LEXIS 31970, No. 09 Civ. 538 (RA) at Page 4 – FIRST AMENDED COMPLAINT

*8 (S.D.N.Y. March 7, 2013) (“Penguin has failed to satisfy the ‘substantial revenue’ requirement of the long-arm statute.”).

FIRST CLAIM FOR RELIEF

(Copyright Infringement- 17 U.S.C. § 501)

24. Penguin repeats the averments contained in paragraphs 1 through 23 as if set forth in full.

25. Penguin’s copyright rights in *The Golden Ass*, *Oil!*, *It Can’t Happen Here*, and *On the Nature of the Universe* (the “Works”) are valid and enforceable.

26. American Buddha has infringed Penguin’s copyright rights in the Works.

27. American Buddha’s reproduction and distribution of the Works is not exempted from liability by Section 108 of the Copyright Act, 17 U.S.C. § 108.

28. American Buddha’s reproduction and distribution of the Works in their entirety is not fair use under Section 107 of the Copyright Act, 17 U.S.C. § 107.

29. American Buddha’s acts have irreparably damaged and, unless enjoined, will continue to irreparably damage Penguin.

30. Penguin has no adequate remedy at law for these wrongs and injuries.

31. Penguin is, therefore, entitled to a preliminary and permanent injunction restraining and enjoining American Buddha, its agents, servants, employees, and attorneys and all persons acting in concert with them from infringing Penguin’s copyright rights in the Works.

32. Penguin is entitled to recover all damages sustained as a result of American Buddha’s unlawful conduct.

WHEREFORE, Penguin demands judgment:

A. Preliminarily and permanently enjoining American Buddha, its agents, servants, employees, and attorneys and all those acting in concert with them from directly or indirectly infringing Penguin’s copyright rights in the Works in violation of 17 U.S.C. § 501;

B. Awarding to Penguin its actual damages incurred as a result of American Buddha's infringement of Penguin's copyright rights in the Works, and all profits American Buddha realized as a result of its acts of infringement, in amounts to be determined at trial; or in the alternative, awarding to Penguin, pursuant to 17 U.S.C. § 504, statutory damages for the acts of infringement committed by American Buddha to the extent available; and

C. Granting such other and further relief as this Court deems just and proper.

DATED this 12th day of September, 2013.

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